### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

DOUG SOMBKE, on behalf of himself, and all others similarly situated,	)
Plaintiff,	)
v. MONSANTO COMPANY,	) C.A. No. 07-122-SLR
Defendant.	) ) )
CENTURY ACRES, INC., on behalf of itself, and all others similarly situated,	) )
Plaintiff,	) ) 
v.	) C.A. No. 07-123-SLR
MONSANTO COMPANY,	)
Defendant.	)

## DEFENDANT MONSANTO COMPANY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Monsanto Company ("Monsanto") moves this Court to dismiss Plaintiffs' respective Complaints in the above-captioned actions for failure to state a claim upon which relief can be granted. Because the Complaints in the two cases are nearly identical and are subject to dismissal on the same grounds, and for the convenience of the Court, a single motion to dismiss is being filed (in each civil action). In support of its motion to dismiss, Monsanto states as follows:

#### NATURE AND STAGE OF THE PROCEEDINGS

On February 27, 2007, Plaintiffs Doug Sombke and Century Acres, Inc. filed these putative class actions against Monsanto. (C.A. Nos. 07-122-SLR and 07-123-SLR). Plaintiffs' Complaints largely replicate complaints by the same counsel in two related actions, *Pullen Seeds and Soil v. Monsanto Co.*, C.A. No. 06-599-SLR and *Wade Farms* v. *Monsanto Co.*, C.A. No. 06-600-SLR, except that plaintiffs purport to represent farmers from different states than the plaintiffs in *Pullen Seeds* and *Wade Farms*. <sup>1</sup>

Defendant Monsanto has moved to dismiss *Pullen Seeds* and *Wade Farms* because the plaintiffs' technology agreements with Monsanto designated St. Louis, Missouri as the exclusive forum for the lawsuits. Plaintiffs here executed the same technology license agreements containing the same forum selection clause. Their claims, therefore, also should be dismissed.

#### **ARGUMENT**

As reflected in the attached chart, Exhibit A hereto, the material allegations in these cases are identical to those in *Pullen Seeds* and *Wade Farms*. Given the parallel complaints filed by the same counsel, and to avoid repetitive pleadings, Monsanto incorporates by reference its Memorandum in Support of its Motions to Dismiss in *Pullen Seeds* and *Wade Farms*, filed on November 20, 2006 and its Reply memorandum filed on January 12, 2007. (*See* Exs. B and C hereto). As set forth in more the detail in those briefs, this case should be dismissed because:

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The allegations also track almost verbatim those in *Am. Corn Growers Ass'n v. Monsanto Co.*, C.A. No. 07-100-SLR, brought by the same counsel, for an association purportedly suing on behalf of its members.

- 1. Plaintiffs sued in the wrong forum. Plaintiffs claim they are "licensed grower[s]" of crops containing Monsanto's glyphosate-tolerant seed traits. (Sombke/Century Acres Compls. ¶ 17). Under their license agreements with Monsanto, which allowed them to use seed with those patented traits, St. Louis is the exclusive forum for all claims "arising out of or connected in any way" with the agreements or "the use of the seed or the Monsanto technologies." (See Ex. D hereto).
- 2. The forum selection clause in Plaintiffs' license agreements is valid and enforceable. See, e.g., Blades v. Monsanto., No. 00-CV-4034-DHR, 2001 WL 775980 (S.D. Ill. Jan. 3, 2001); Massey v. Monsanto., No. 299-CV-218-P-B, 2000 WL 1146705 (N.D. Miss. June 13, 2000).
- 3. Plaintiffs' claims fall within the forum selection clause. Plaintiffs assert that Monsanto used the very licenses executed by Plaintiffs to restrain trade and monopolize the market for glyphosate. (Sombke/Century Acres Compls. ¶¶ 86-90 (attacking technology agreement)).
- 4. In this Circuit, breach of a forum agreement warrants dismissal. *Salovaara v. Jackson Nat'l Life Ins.*, 246 F.3d 289, 298 (3d Cir. 2001). The Court thus should dismiss the Complaints without prejudice to re-filing in St. Louis, where 13 cases advancing similar claims are pending.

#### **CONCLUSION**

For the foregoing reasons and those advanced in *Pullen Seeds* and *Wade* 

Farms, the Court should dismiss the Complaints.

Respectfully submitted,

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Dated: March 20, 2007

784580 / 30803

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#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

#### CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on March 20, 2007, the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading:

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# **Exhibit A**

## CHART OF IDENTICAL OR MATERIALLY IDENTICAL ALLEGATIONS IN SOMBKE/CENTURY ACRES COMPLAINTS AND PULLEN SEEDS/WADE FARMS/ACGA COMPLAINTS

Sømbke/Century	Identical or	Identical or	Identical or Materially Identical	
Acres	Materially Identical Paragraphs in	Materially Identical Paragraphs in	Paragraphs in	
Paragraph:	Wade Farms	Pullen Seeds	ACGA	
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28	Caption in Four Cases:		oci Ciass	
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	33	30		
32	33	31		

	Identical or	Identical or	Identication
Sombke/Century	Materially Identical	Materially Identical	Materially Identical
Acres	Paragraphs in	Paragraphs in	Paragraphs in
Paragraph:	Wade Farms	Pullen Seeds	ACGA
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46	49	47	30
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	Caption in All Five Cases		
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Sombke/Century	Identical or	Identical or Materially Identical	Identical or Materially Identical
Acres	Materially Identical Paragraphs in	Paragraphs in	Paragraphs in
Paragraph:	Wade Farms	Pullen Seeds	ACGA
63	65	63	47
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Monsanto Used Excl	usive Dealing Contracts	with Independent Seed	Companies to Block
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67	69 (first part similar)	67 (first part similar)	51
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72	70 (last part similar)	68 (last part similar)	56
73	71	69	57
74	73	71	58
75	74	72	59
76	75	73	60
77	76	74	61
78	77	75	62
Section Caption in All Five Cases:			
Monsanto Exploi	ts its Monopoly in the G	lyphosate Tolerant Seed	l Traits Market to
	/Maintain its Monopoly		
79	79	77	63
80	83 (similar)	81 (similar)	64
81	84	82	65
82	85	83	66
83	86	84	67
84	87	85	68
85			69
86	88	86	70
87	89	87	71
88	90	88	72
89	91	89	73
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91	93 (first half)	91 (first half)	75
92	93 (second half)	91 (second half)	76
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Sombke/Century	Identical or	Identical or	- Identical or
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	4	ı in Four Cases:	
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	(Anticompetitive Tyin	g/Bundling Agreement)	
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Paragraph:	Paragraphs in	- Paragraphs in	Paragraphs in
	Wade Farms	Pullen Seeds	ACGA
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127	131	129	
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F	F	F	
G	G	G	С
H	H	H	D

Sources: Complaint, Sombke v. Monsanto Co., No. 07-122 (D. Del. filed Feb. 27, 2007); Complaint, Century Farms v. Monsanto Co., No. 07-123 (D. Del. filed Feb. 27, 2007); Complaint, American Corn Growers Association v. Monsanto Co., No. 07-100 (D. Del. filed Feb. 21, 2007); Complaint, Pullen Seeds and Soil v. Monsanto Co., No. 06-599 (D. Del. filed Sept. 26, 2006); Complaint, Wade Farms v. Monsanto Co., No. 06-600 (D. Del. filed Sept. 26, 2006)

# **Exhibit B**

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

PULLEN SEEDS AND SOIL, on behalf of itself and all others similarly situated,	)
Plaintiff,	) }
v.	) C.A. No. 06-599-SLR
MONSANTO COMPANY,	<u> </u>
Defendant.	)
WADE FARMS, WHITTINGTON & SUMNER FARMS, CLIFFORD F. DANCE, D/B/A CLIFFORD DANCE FARMS, and all others similarly situated,	) ) ) ) (C.A. No. 06-600-SLR
Plaintiffs,	) C.A. No. 00-000-32R
٧.	)
MONSANTO COMPANY,	<u>}</u>
Defendant.	)

#### MEMORANDUM IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S MOTIONS TO DISMISS

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Dated: November 20, 2006

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#### NATURE AND STAGE OF THE PROCEEDINGS

On September 26, 2006, Plaintiff Pullen Seeds and Soil filed a putative class action (C.A. No. 06-599-SLR) against Defendant Monsanto Company. On the same day, Plaintiffs Wade Farms, Whittington & Sumner Farms, and Clifford F. Dance Farms filed a virtually identical action (C.A. No. 06-600-SLR) against Monsanto. Defendant Monsanto moves to dismiss the Complaints in both cases pursuant to Fed. R. Civ. P. 12(b)(6). Because the Complaints in the two cases are nearly identical and are subject to dismissal on the same ground, this Memorandum, for the convenience of the Court, addresses the motions filed in both cases.

#### SUMMARY OF THE ARGUMENT

1. Plaintiffs brought these antitrust cases in the wrong forum. Plaintiffs are "licensed growers" of genetically modified corn, soybean, and other seed containing genetic traits patented by Monsanto. (Pullen Compl. ¶ 16; Wade Compl. ¶ 16-18). Plaintiffs entered into license agreements with Monsanto to grow seed containing Monsanto's seed trait technologies. The Complaints assert that Monsanto wielded its purported control over its patented seed traits - and used the very patent licenses executed by Plaintiffs - to restrain trade and monopolize the market for glyphosate, the generic name of Monsanto's "Roundup" herbicide. Plaintiffs claim that the licenses improperly required them and other putative class members to purchase Monsanto's glyphosate herbicides in order to use Monsanto's seed traits. Plaintiffs characterize the seed trait license agreements as "unlawful," "exclusionary," and "anticompetitive." (Pullen Compl. ¶ 92; Wade Compl. ¶ 94). But those same agreements, which bind Plaintiffs as licensees, designate courts in St. Louis as "the sole and exclusive jurisdiction and venue" for "all claims and disputes arising out of or connected in any way with this agreement and the use of the seed or the Monsanto technologies." Unlike the forum selection clause in Monsanto's license agreements with some seed companies, which this Court found in American Seed v. Monsanto, C.A. No. 05-535-SLR to be permissive, this provision is mandatory. It says unequivocally that, "Any lawsuit must be filed in St. Louis, Mo." By contrast, the provision at issue in American Seed merely stated that disputes "may be heard and determined in" Missouri.

To be sure, Plaintiffs' implausible claims should not proceed in any forum, as it is a matter of public record that the price of glyphosate has plummeted, conclusively rebutting allegations of monopolization. But that issue is for a later day. The question of where the cases will be litigated should be resolved at the outset.1

2. Federal courts in antitrust putative class actions repeatedly have enforced the forum selection clause contained in the patent license agreement at issue here. See, e.g., Blades v. Monsanto Co., No. 00-CV-4034-DHR, 2001 WL 775980, at \*3-4 (S.D. III. Jan. 3, 2001); Massey v. Monsanto Co., No. 299-CV-218-P-B, 2000 WL 1146705, at \*2 (N.D. Miss. June 13, 2000). In this Circuit, breach of a forum selection clause is grounds for dismissal. Salovaara v. Jackson Nat'l Life Ins., 246 F.3d 289, 298 (3d Cir. 2001). The Court therefore should dismiss the Complaints, without prejudice to Plaintiffs refiling them in St. Louis, Missouri, where over a dozen cases containing allegations similar to those here currently are pending.

See Palcko v. Airborne Express, Inc., 372 F.3d 588, 597-98 (3d Cir. 2004) (defendant that moved to dismiss concerning threshold forum issues did not waive right to later bring motion to dismiss for failure to state a claim based on arbitration or other grounds that are not expressly waived under Fed. R. Civ. P. 12(h)(1)).

#### STATEMENT OF FACTS

#### Á. Plaintiffs' Complaints

In September 2006, Plaintiff Pullen Seeds and Soil, an Iowa company that grows genetically modified seed in Iowa (Pullen Compl. ¶ 16), filed its Complaint against Monsanto Company. On the same day, Plaintiffs Wade Farms, Whittington & Sumner Farms, and Clifford F. Dance Farms - all Mississippi businesses that grow genetically modified seed in Mississippi - filed a virtually identical Complaint against Monsanto. (Wade Compl. ¶ 16-18). Plaintiffs do not claim to have any relationship with this forum.

Monsanto is a Delaware corporation headquartered in St. Louis, Missouri. (Pullen Compl. § 17; Wade Compl. § 19). Monsanto manufactures Roundup brand herbicides. (Pullen Compl. ¶ 1, 37; Wade Compl. ¶ 1, 39). It also holds patents for genetic seed traits, and it licenses seed companies to include those traits in corn, soybean, and other seed. (Pullen Compl. ¶ 1, 43-46; Wade Compl. ¶ 1, 45-48).

Plaintiffs claim that Monsanto violated federal and state antitrust laws "by using its monopoly power in various biotechnology seed trait markets to unlawfully monopolize and restrain competition in the market for glyphosate herbicides." (Pullen Compl. ¶ 2; Wade Compl. ¶ 2). The Complaints focus on Monsanto's patented seed traits that make crops resistant to glyphosate-based herbicides, such as Roundup. Specifically, Plaintiffs allege that Monsanto improperly used the "seed trait monopolies" its patents conferred, to keep other companies from developing their own new seed traits providing resistance to non-glyphosate-based herbicides. (Eg., Pullen Compl. ¶¶ 6, 58-60, 80; Wade Compl. ¶¶ 6, 60-62, 82). Because other companies did not develop such new traits, Plaintiffs allegedly "paid non-competitive and artificially inflated prices" for

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Roundup. (Pullen Compl. ¶¶ 1-2; Wade Compl. ¶¶ 1-2). In short, Plaintiffs allege that Monsanto's conduct regarding seed traits affected the price of herbicides.

Based on this theory, Plaintiffs seek only declaratory and injunctive relief under federal antitrust laws for nationwide classes of direct and indirect purchasers of Roundup herbicides. (Pullen Compl. ¶ 20; Wade Compl. ¶ 22). Disregarding a clear conflict of interest, Plaintiffs also seek damages under state laws for a small subset of these federal injunction putative classes, indirect purchasers of Roundup in Iowa (Pullen Compl. ¶ 27) and Mississippi (Wade Compl. ¶ 29).

#### Plaintiffs Assert That Their Alleged Injuries Resulted In Part B. From Their Allegedly Anticompetitive Agreements With Monsanto

Plaintiffs' theory rests on the allegation that Monsanto suppressed competition in genetically modified traits. (Pullen Compl. ¶ 1-2; Wade Compl. ¶ 1-2). Monsanto has been litigating that issue for several years in more than a dozen cases now pending before a federal court in St. Louis. See Schoenbaum et al. v. E.I. Dupont de Nemours and Co. et al., No. 4:05-CV-01108-ERW (E.D. Mo.) (13 cases filed in 2004, transferred to Missouri in 2005 and consolidated); McIntosh v. Monsanto Co., No. 4:01-CV-0065 (E.D. Mo.) (consolidated cases filed 1999 and 2000, transferred to Missouri in 2001). Indeed, it appears that Plaintiffs drew on those complaints.2

As in the pending St. Louis federal actions, Plaintiffs allege that Monsanto used its patent license agreements with farmers ("Technology Agreements") to further the purported scheme to monopolize. (See Pullen Compl. ¶¶ 8, 82-92; Wade Compl. ¶¶ 8, 84-94). Specifically, according to Plaintiffs, "Monsanto has . . . imposed exclusionary

The chart attached as Ex. A highlights the striking parallels between the complaints in the Missouri cases and those filed here.

and restrictive conditions at the grower level that prevent growers from using generic glyphosate in connection with Monsanto's glyphosate tolerant seed traits." (Pullen Compl. ¶ 86; Wade Compl. ¶ 88). In particular, Plaintiffs allege, "Monsanto requires growers to sign a technology license . . . that effectively mandates that they use only Roundup herbicides" on seeds containing Monsanto's patented traits. (Pullen Compl. ¶ 86; Wade Compl. ¶88). Plaintiffs allege that Technology Agreements from 1998 to 2000 improperly "conditioned the grant of a license to use its Roundup Ready seed technology on the grower's agreement to purchase and use only Monsanto's Roundup herbicide." (Pullen Compl. ¶ 86; Wade Compl. ¶ 88).

Further, Plaintiffs claim, "[w]hile the language in Monsanto's more recent [Technology Agreements] appear[s] to permit a grower to use a non-Roundup glyphosate herbicide in connection with Monsanto's glyphosate-tolerant seed traits, other aspects of the Grower's Agreement demonstrate that this 'choice' is illusory and that a grower is still effectively locked into using Roundup virtually exclusively." (Pullen Compl. § 87; Wade Compl. ¶89). Indeed, Plaintiffs attack the Agreement twice on this ground, alleging that "Monsanto has effectively maintained the same condition in its technology license that requires a grower using Monsanto's biotechnology seed traits to use Roundup virtually exclusively rather than a cheaper generic glyphosate herbicide." (Pullen Compl. ¶ 90; Wade Compl. ¶ 92). Plaintiffs assert in addition that an "inherent component of the Tech Fee" payable under the Agreement resulted in overcharges for Roundup. (Pullen Compl. ¶88; Wade Compl. ¶90). In sum, Plaintiffs claim that Monsanto's "anticompetitive conduct including its exclusionary licensing agreements with . . .

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growers . . . has unlawfully restrained trade and maintained its monopoly in the market for glyphosate herbicides." (Pullen Compl. ¶ 92; Wade Compl. ¶ 94).

#### C. Plaintiffs' Technology Agreements With Monsanto Required These Actions to Be Filed in a St. Louis Court

As licensees under the Technology Agreement, Plaintiffs were obligated to bring these claims in St. Louis. The applicable Agreements provide:

> THE PARTIES CONSENT TO THE SOLE AND EXCLUSIVE JURISDICTION AND VENUE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, AND THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI, (ANY LAWSUIT MUST BE FILED IN ST. LOUIS, MO) FOR ALL CLAIMS AND DISPUTES ARISING OUT OF OR CONNECTED IN ANY WAY WITH THIS AGREEMENT AND THE USE OF THE SEED OR THE MONSANTO TECHNOLOGIES EXCEPT FOR COTTON-RELATED CLAIMS MADE BY THE GROWER.

(See Ex. B, 2006 Technology Agreement at 2; Ex. C (sample Technology Agreements used since 1998); Ex. D (signature page to agreements signed by Plaintiffs)).3 Given that Plaintiffs expressly attack the Technology Agreement, these cases arise out of and are connected with the Agreements under attack, as well as with Plaintiffs' use of genetically modified seed and Monsanto's technologies. Plaintiffs thus were contractually bound to file these cases in St. Louis.

Monsanto uses a new Technology Agreement for each crop year and the forum clause language changed in non-material ways over time. The United States District Court for the Eastern District of Missouri held that, because the Agreements provide that they remain in effect until terminated and that continuing use of Monsanto's technologies after new terms are issued constitutes an agreement to be bound by the new terms, the forum clause in the most recent Technology Agreement applies. Monsanto v. Baumgardner, No. 4:04-CV-00708 ERW, Mem. and Order at 9 n.10 (E.D. Mo. Mar. 29, 2005) (Ex. E). Accordingly, the forum clause in the 2006 Technology Agreement is applicable here. In any event, the question of which version of the Agreement applies is of no consequence, because the Complaints must be dismissed under any iteration.

#### STANDARD FOR MOTION TO DISMISS

The Court of Appeals for the Third Circuit has held that, "a 12(b)(6) dismissal is a permissible means of enforcing a forum selection clause." Salovaara v. Jackson Nat'l Life Ins., Co., 246 F.3d 289, 298 (3d Cir. 2001) (affirming dismissal of action based on forum clause requiring a state or federal court in another forum); Crescent Int'l Inc. v. Avatar Cmtys., Inc., 857 F.2d 943, 944-45 (3d Cir. 1988) (similar).4

Although a court considering a motion under Fed. R. Civ. P. 12(b)(6) focuses on the pleadings, it can properly review contracts or other documents referenced in the complaint. See Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); Chambers v Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). A court also can take judicial notice and consider matters such as pleadings in other cases, see Southmark Prime Puls, LP v. Falzone, 776 F. Supp. 888, 892 (D. Del. 1991); Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983), and official government records. See Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006).

A court also has power, on its own motion, to transfer a case to another federal forum should it determine that transfer, rather than dismissal, is the appropriate course. Salovaara, 246 F.3d at 299.

#### THIS COURT SHOULD DISMISS THE COMPLAINTS BECAUSE PLAINTIFFS AGREED TO BRING THESE ACTIONS IN A ST. LOUIS COURT

#### The Forum Selection Clause is Valid, Binding, and Enforceable Á.

Forum selection clauses are "presumptively valid" and enforceable unless enforcement would be unreasonable under the circumstances. E.g., Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983), abrogated on other grounds, Lauro Lines v. Chasser S.R.L., 490 U.S. 495 (1989); accord M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988); Bbdova, LLC v. Auto Techs., Inc., 358 F. Supp. 2d 387, 390 (D. Del. 2005). To overcome the presumption, a party challenging enforcement of a forum clause must show "(1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." Coastal Steel, 709 F.2d at 202; accord Bbdova, 358 F. Supp. 2d at 390.

Plaintiffs can make none of these showings. First, nowhere do Plaintiffs allege that they entered into the Technology Agreements as the result of fraud, undue influence, or duress. Nor could Plaintiffs make such allegations. Courts repeatedly have found the Technology Agreement's forum selection clause, a standardized agreement, valid and enforceable.<sup>5</sup> For example, in Blades v. Monsanto (now docketed and pending in St.

See, e.g., Blades Co. v. Monsanto, No. 00-CV-4034-DHR, 2001 WL 775980, at \*3 (S.D. Ill. Jan. 3, 2001) (rejecting argument in antitrust case that Technology Agreement and forum clause were contracts of adhesion or the result of fraud); Massey v. Monsanto Co., No. 299-CV-218-P-B, 2000 WL 1146705, at \*2 (N.D. Miss. June 13, 2000) (rejecting argument in antitrust case that forum selection clause in Technology Footnote continued on next page

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Louis as McIntosh v. Monsanto), the complaint alleged "that Monsanto Company committed antitrust violations and violations of other laws in the pricing, selling, marketing and promotion of the GM corn and soybean seeds." 2001 WL 775980, at \*1. The complaint also alleged, as the Complaints here, that the Technology Agreements improperly required "a farmer who buys Roundup Ready seeds [to] purchase Roundup [herbicide] from Monsanto at whatever price Monsanto decides to charge." See Blades v. Monsanto Co., No. 00-CV-4034, Orig. Compl. ¶ 79 (S.D. III. Feb. 14, 2000) (Ex. F). The court held that the forum clause was not an adhesion contract and found nothing to "establish as a matter of law that the forum selection clause is unconscionable." 2001 WL 775980, at \*3 The court therefore enforced the clause by transferring that case and a related action to St. Louis federal court:

> Having found the forum selection clause in the Technology Agreements entered into by Peterson valid, the Court concludes that venue in this judicial district is not proper. but instead lies within the United States District Court for

Footnote continued from previous page

Agreement was the result of "fraud, undue influence, or an overwhelming bargaining power."); see also McNair v. Monsanto Co., 279 F. Supp. 2d 1290, 1302 (M.D. Ga. 2003) (no showing in tort and contract case of "a disparity in bargaining power such that it would be unjust or unreasonable to enforce the forum selection clause."); Monsanto Co. v. McFarling, 302 F.3d 1291 (Fed. Cir. 2002) (upholding finding in patent infringement and breach of contract case that Technology Agreement was valid and enforceable); Monsanto Co. v. Swann, No. 4:00-CV-1481 CEJ, 2001 WL 34053250 (E.D. Mo. Sept. 25, 2001) ("The Court has been called upon to consider this clause on several prior occasions, and has consistently found that it is both valid and enforceable."); Monsanto Co. v. Nelson, No. 4:00-CV-1636 CEI, 2001 WL 34079479, at \*1 (E.D. Mo. Sept. 10, 2001) (finding in patent infringement and breach of contract case that "forum selection clause is neither unjust, unreasonable, nor invalid"); Monsanto Co v. White, No. 4:00-CV-1761 RWS, 2001 WL 34053249, at \*4 (E.D. Mo. June 22, 2001) (upholding forum selection clause in patent infringement and breach of contract case and noting that commercial farmer "cannot now ignore the law or the parties' agreement"); Monsanto Co. v. Dawson, No. 4:98-CV-02004 TCM, 2000 WL 33952259, at \*2 (E.D. Mo. Aug. 18, 2000) (finding in patent infringement and breach of contract case that forum clause "is neither unjust, unreasonable, nor invalid."); Monsanto Co. v. Godfredson, No. 4:99-CV-1691 CDP, 2000 WL 33952257 (E.D. Mo. April 13, 2000) (upholding forum selection clause in patent infringement and breach of contract case).

the Eastern District of Missouri. Specifically, the Technology Agreement exclusively provides for both venue and jurisdiction in the Eastern District of Missouri, Eastern Division. In the case at bar, the parties freely negotiated the contractually chosen forum. Plaintiffs have not shown any fraud or overreaching by Monsanto in the Technology Agreement between Peterson and Monsanto. Therefore, Plaintiffs should not be allowed to bypass the contractual agreement now by bringing suit in the wrong court.

Id at \*4. Here, too, Plaintiffs cannot meet their heavy burden of showing the clause is unreasonable and should not be allowed to shirk their contractual obligations by bringing suit outside St. Louis.

Second, enforcement of the forum selection clause in this case violates no strong public policy of Delaware. On the contrary, dismissing these cases provide Plaintiffs the opportunity to refile in the United States District Court for the Eastern District of Missouri, where the Court already is considering allegations by members of the putative classes here that parallel, overlap, and potentially conflict with Plaintiffs' allegations. Thus, dismissing the cases under the forum selection clause here would promote judicial economy. See Firmani v. Clarke, 325 F. Supp. 689, 693 (D. Del. 1971) ("A strong public policy favors bringing all such litigation together in one tribunal so that pretrial discovery may be conducted more efficiently, witnesses' time may be conserved, public and parties' litigation expenses may be reduced, and inconsistent results can be avoided."); United States Fid. & Guar. Co. v. Am. Home Assurance, No. 98 CIV 3099 JGK, 2001 WL 300735, at \*17 (S.D.N.Y. Mar. 27, 2001) ("In this case, given that the parties involved in the cross-claims are, for the most part, Brazilian entities, litigation is already being pursued by IVI and Sade in Brazil, and the will of the parties to the various contracts is carried out to the greatest extent possible by having the IVI Group litigate

their claims against Petrobras in Brazil, the IVI Group has not overcome the presumptive validity of the forum selection clauses").

To be sure, as the Court is aware, American Seed Co. v Monsanto Co., C.A. No. 05-535-SLR, which is pending in this District, involves claims by direct purchaser-seed companies that Monsanto monopolized markets for genetically modified corn. The case also includes claims by intervenors who are growers of genetically modified corn in Minnesota and Iowa. However, the Missouri cases, like these cases and unlike American Seed, principally involve plaintiffs who are growers. Further, the Missouri cases, like these cases and unlike American Seed, include claims concerning crops other than corn. Thus, dismissal here advances not only the policy in favor of enforcing contractual commitments, but also the interests of judicial economy.

Third, litigating in St. Louis will not be "so gravely difficult and inconvenient that [Plaintiffs] will for all practical purposes be deprived of [their] day in court." Bbdova, 358 F. Supp. 2d at 390. Missouri in fact appears more convenient for Plaintiffs than this Court, and is far more convenient for Monsanto. Plaintiffs are Iowa and Mississippi businesses. They grow crops in Iowa and Mississippi. And they purport to represent classes of Iowa and Mississippi residents on claims under Iowa and Mississippi law. Plaintiffs' only apparent connection to Delaware is that one of the eight law firms representing them is in Wilmington. (Pullen Compl. pp. 40-41; Wade Compl. pp. 41-42). By comparison, Monsanto is headquartered in St. Louis (Pullen Compl. ¶ 17; Wade Compl. ¶ 19). Its executives therefore are in St. Louis, as are corporate records. Moreover, by entering into the Technology Agreement, Plaintiffs acknowledged that Missouri is a reasonable forum - in fact, the exclusive forum - for these actions. See

Jumara v State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995) ("a forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum").

#### В. Plaintiffs' Disputes With Monsanto Arise Out of and Are Connected With the Technology Agreement

The forum selection clause here is broad and provides that "all claims and disputes arising out of or connected in any way with this agreement and the use of the seed or the Monsanto technologies" must be filed in St. Louis. (See Ex. B (emphasis added)). The Third Circuit has held that forum selection clauses covering "disputes," as this one does, have a much broader scope than those covering "claims" related to a contract. John Wyeth & Brother Ltd. v. Cigna Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997) (Alito, J.). The court also held that a clause using language such as "related to" equivalent to the language "connected in any way with" in the Agreement here - makes the forum selection clause even more expansive. Id. For example, applying John Wyeth & Brothers, a district court within the Third Circuit recently found that a clause similar to the one here, which applied to "disputes arising out of or related in any way" to the contract covered more than just claims based on breach of contract. Kahn v. Am. Heritage Life Ins., No. 06-01832, 2006 WL 1879192, at \*6 (E.D. Pa. June 29, 2006). The court recognized that such broad provisions can encompass non-contractual claims if the contract was at least connected to the underlying, allegedly unlawful scheme. See id. (insurance agent's claims under the Pennsylvania Human Relations Act against insurer, "while not based on her contract with Defendants, arise out of the contractual relationship created between them by the contract, and her claims implicate the contract to the extent that she claims termination of the contract was a form of unlawful retaliation under the PHRA. Thus, Plaintiff's PHRA claims are sufficiently related to the agent contract to fall

within the scope of the broadly worded forum selection clause included therein."); see also Hay Acquisition Co., I., Inc. v. Schneider, No. 2:04-CV-1236, 2005 WL 1017804, at \*6 (E.D. Pa. Apr. 27, 2005) ("Third Circuit [precedent] is clear that 'broad, unconditional forum selection clauses which mandate jurisdiction in a specific forum . . . apply to all claims, whether they be based in tort or contract, and shall be enforced" (quoting Oak Sys. v. Fracotyp-Postalia, Inc., et al., No. 01-2794, 2002 U.S. Dist. LEXIS 2213, at \*7 (3d Cir. Feb. 5, 2002)).6

Finally, the forum selection clause in the Technology Agreement is mandatory, not permissive. The parties consent to the "sole and exclusive jurisdiction and venue" of the St. Louis courts. "Sole" and "exclusive" are unambiguous, meaning that there is no other. But to reinforce the point, the clause here adds that "any lawsuit must be filed in St. Louis, MO." The clause thus bears no resemblance to the one in some licenses with seed companies — not growers — which provided that claims "may be heard and determined in" Missouri. See American Seed Co, Inc, v. Monsanto Co., C.A. No. 05-535-SLR, Order (D. Del. Dec. 5, 2005) (Ex. G) (order denying transfer on ground that this language was permissive (emphasis added)).

Here, Plaintiffs' allegations of wrongdoing envelop the Technology Agreement.

As discussed, Plaintiffs claim that earlier versions of the Technology Agreement
unlawfully compelled growers to purchase Roundup herbicide, that the current

Agreement restrains trade, and that components of the fees paid under the Technology

Beyond that, the Third Circuit has found that even more narrowly worded clauses may cover non-contract claims if the dispute implicates the parties' contractual relation or contract terms. See Crescent Int'l, Inc. v. Avatar Cmtys., Inc., 857 F.2d 943 (3d Cir. 1988 (per curiam) (finding that clause stating that "any litigation upon any of [the contractual] terms... shall be maintained" in Florida courts, included RICO and tort claims since they "arise out of contractual relation and implicate the contract's terms").

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Agreement have resulted in overcharges for Roundup. (Pullen Compl. ¶ 86; Wade Compl. ¶ 88). Plaintiffs describe the Agreement as "exclusionary" and "restrictive." contend that it "effectively mandates that [farmers] use only Roundup herbicides on Roundup Ready crops," and complain that "the grower is still effectively locked into using Roundup virtually exclusively." (Pullen Compl. ¶ 86-88, 92; Wade Compl. ¶ 88-90, 94). These claims do not merely "arise under" the Agreement. They are explicitly predicated on it. They are not merely "connected with" the use of Monsanto's technology. They center on the alleged tie between the use of the technology and the purchase of Roundup.

#### CONCLUSION

Plaintiffs agreed to bring suits like these in St. Louis. Those agreements are valid and enforceable. The Court therefore should dismiss the Complaints.

OF COUNSEL:

Respectfully submitted,

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763266 / 30803

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### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

#### **CERTIFICATE OF SERVICE**

I, David E. Moore, hereby certify that on November 20, 2006, the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading:

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763267 / 30803

# **Exhibit C**

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

PULLEN SEEDS AND SOIL, on behalf of itself and all others similarly situated,	<b>)</b>
Plaintiff,	{
v.	) C.A. No. 06-599-SLR
MONSANTO COMPANY,	<i>,</i>
Defendant.	}
WADE FARMS, WHITTINGTON & SUMNER FARMS, CLIFFORD F. DANCE, D/B/A CLIFFORD DANCE FARMS, and all others similarly situated,  Plaintiffs,	) ) ) ) ) C.A. No. 06-600-SLR
ν.	
MONSANTO COMPANY,	<i>)</i> }
Defendant.	}

#### REPLY MEMORANDUM IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S MOTIONS TO DISMISS

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# INTRODUCTION

Plaintiff's repeatedly accuse Monsanto of trying to "have it both ways." Pls.'

Opp'n Br. 2, 18. Yet Plaintiffs' opposition is a study in contradiction.

- Plaintiffs' complaints allege that Monsanto imposed an unlawful tying arrangement by requiring "growers to sign a technology license, Grower's Agreement and Technology Use Agreement ('TUA') that effectively mandates that they use only Roundup herbicides on Roundup Ready crops." Pullen Compl. ¶ 86; Wade Compl. ¶ 88. But Plaintiffs' opposition brief asserts that these lawsuits are not, in the language of the forum selection clause in their Technology Agreements, "disputes arising out of or connected in any way with the agreement and the use of the seed or the Monsanto technologies." Pls.' Opp'n Br. 10; Def.'s Mem. Ex. B.
- Plaintiffs seek to enjoin Monsanto from imposing conditions on "growing or using seed containing Monsanto's glyphosate-tolerant traits (the tying product or products)." Pullen Compl. ¶ 97; Wade Compl. ¶ 99. But they contend in their opposition brief that they "do not assert any claim for relief, contractual or otherwise, concerning their purchases of seed covered by the Technology Agreements." Pls.' Opp'n Br. 9.

Plaintiffs agreed by contract to bring these suits in St. Louis, and they cannot extinguish that obligation by ignoring the allegations in their own complaints.

Nor can Plaintiffs evade their contractual commitment by creating artificial limitations on the scope of the forum clause. That their claims seek damages based on alleged overcharges for glyphosate and not seed, for instance, does not foreclose

application of the forum selection clause. On the contrary, the centerpiece of their glyphosate claims and the target of their injunctive relief is the agreement by which Monsanto licensed use of its seed traits. Moreover, even if Plaintiffs were correct which they are not - that the Third Circuit enforces forum clauses only when the claims are completely "dependent on the contractual relationship between the parties," Pls.' Opp'n Br. 13, the fact is that the claims here do depend on the contract. Their Technology Agreement is the vehicle through which the alleged anticompetitive scheme was achieved, and courts repeatedly have applied the forum clause to antitrust conspiracy claims similar to those here.

Plaintiffs' arguments that the forum selection clause is unenforceable as a matter of law likewise fail. The well-established law in this Circuit enforces such contractual commitments absent compelling reasons to forbear. Here, there are no reasons, compelling or otherwise, to override the contract. Court after court has held that the very forum selection clause at issue here is valid. Court after court has found that it is reasonable. Court after court has required growers challenging Monsanto's marketing of genetic traits to proceed in St. Louis.

Plaintiffs cannot escape these holdings by asserting that if the forum clause applies to these claims, so too must another provision of the Technology Agreement that limits remedies for losses "resulting from the use or handling of seeds containing Monsanto technology." Def.'s Mem. Ex. B (emphasis added). This result as to the separate remedies clause. Plaintiffs contend, would be unconscionable, invalidating the entire Agreement. This claim is contrived. The remedies clause is not at issue here. On its face, it is narrower than the forum selection clause, which covers "all claims and

disputes arising out of or connected in any way with the agreement and the use of the seed or the Monsanto technologies." Def.'s Mem. Ex. B (emphasis added). Monsanto has not contended that the remedies clause limits the damages available under the antitrust laws, and it does not do so here.

Finally, Plaintiffs' argument concerning the supposed comparative convenience of this forum is irrelevant. In the Third Circuit, a forum selection clause should be enforced unless it would "result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." E.g., Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983), abrogated on other grounds, Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989). Moreover, Plaintiffs are from Iowa and Mississippi and have no connection to Delaware. They cannot convincingly tout this jurisdiction as more convenient and economical compared with St. Louis, where Monsanto is located and multiple federal antitrust cases, all putative class actions involving genetically modified seed issues, are pending.

This Court therefore should enforce the forum selection clause and dismiss Plaintiffs' complaints.

# ARGUMENT

## I. THE FORUM SELECTION CLAUSE COVERS THESE CASES

The forum selection clause in the Technology Agreement specifies the federal or state court in St. Louis, Missouri as the "sole and exclusive jurisdiction" for "all claims and disputes arising out of or connected in any way with this Agreement and the use of the seed or the Monsanto technologies . . . ." Def.'s Mem. Ex. B (emphasis added). The

Des Moines, Iowa and Jackson, Mississippi are 273 and 437 miles, respectively, from St. Louis, compared with 954 miles and 964 miles, respectively, from Wilmington.

complaints here charge that provisions of the Technology Agreement furthered the alleged anticompetitive scheme. Pullen Compl. ¶ 86; Wade Compl. ¶ 88 (Monsanto requires "growers to sign a technology license, Grower's Agreement and Technology Use Agreement ("TUA") that effectively mandates that they use only Roundup herbicides on Roundup Ready crops."); Pullen Compl. ¶ 92; Wade Compl. ¶ 94 (Monsanto's "anticompetitive conduct including its exclusionary licensing agreements with . . . growers . . . has unlawfully restrained trade and maintained its monopoly in the market for glyphosate herbicides."). The Technology Agreement, Plaintiffs allege, effects a tying arrangement and sustains a monopoly, which Plaintiffs seek to enjoin. Pullen Comp. ¶ 90, 97; Wade Compl. ¶ 92, 99. Indeed, the complaints make clear that the obligations imposed and benefits conferred by the Technology Agreement are "critical" to growers and central to their claims:

[T]o induce growers to buy the significantly more expensive biotechnology seeds, Monsanto included as an inherent component of the Tech Fee and patent/technology license the grower pays, a crop protection program pursuant to which Monsanto agreed to waive the Tech Fee for replacement seeds if the crop fails within the first 60 days of planting. Because, as alleged earlier, the Tech Fee constitutes a substantial component of the grower's seed costs (up to 70%), the crop protection program was and still is a critical factor in a grower's decision to use seed with biotechnology seed traits. Significantly, Monsanto's crop protection program is not otherwise available and cannot be purchased independently by any grower, in large part because Monsanto has exclusive control over its patented seed trait technology, and thus Monsanto has the sole ability to reward or punish growers for their herbicide choices by altering how much, if any, the growers have to pay for Monsanto's seed licenses. Thus, Monsanto is using its monopoly control over various biotechnology seed traits to reward or punish growers depending on whether they use Roundup or a competing manufacturer's glyphosate herbicide.

Pullen Compl. ¶88; Wade Compl. ¶90 (emphasis added). By its terms, then, the forum selection clause applies to Plaintiffs' claims.

That Plaintiffs bring antitrust, rather than contract claims does not remove these cases from the purview of "all claims" or somehow sever their connection to the Agreements they attack. Courts in the Third Circuit have applied similar forum selection clauses to federal antitrust claims. In Nascone v. Spudnuts, Inc., for example, the Third Circuit dismissed a plaintiff's appeal of a district court's decision to transfer an antitrust action, relying on a forum selection clause in the franchise agreement that the district court found reasonable in scope and content. 735 F.2d 763 (3d Cir. 1984). Similarly, in Homeware, Inc. v. Kidde, Inc., the Court found that antitrust claims fell within the relevant forum selection clause because the antitrust "dispute arises from or is related to the terms of the distributorship agreement or the relationship of the parties to the agreement and, thus, is the kind of dispute which plaintiff undertook to submit to a Michigan court." No. 86-3914, 1987 WL 5714, at \*2 (E.D. Pa. Jan. 21, 1987); see also Crescent Int'l, Inc. v. Avatar Cmtys., Inc., 857 F.2d 943, 944-45 (3d Cir. 1988) (if the factual basis of a non-contractual claim lies in the contractual business relationship between the parties, then the claim may be deemed to relate to the parties' contract).

Moreover, as explained in Monsanto's opening brief, courts repeatedly have applied the forum selection clause at issue here in antitrust actions advancing allegations similar to Plaintiffs' claims. See Def.'s Mem. 8-9 n.5; Blades v. Monsanto Co., No. 00-CV-4034-DRH, 2001 WL 775980, at \*4 (S.D. Ill. Jan. 3, 2001) (enforcing forum selection clause in antitrust case and transferring case to Missouri); Massey v. Monsanto

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Co., No. 299CV218-P-B, 2000 WL 1146705 (N.D. Miss. June 13, 2000) (holding forum selection clause valid, binding and enforceable in antitrust case).

Nor does it matter that Plaintiffs address the alleged impact of Monsanto's conduct in the purported market for glyphosate. Their claims are still "connected in any way with" the grower's licenses to use Monsanto's seed trait technologies.2 In fact, they are more than just "connected." Plaintiffs allege that the terms of those licenses are illegal, that Monsanto imposes improper conditions on its licensees, and that these points are "critical." Pullen Compl. ¶ 88; Wade Compl. ¶ 90. Plaintiffs admit as much when, in arguing about judicial economies, they assert that their allegations are "substantially identical" to the allegations in the American Seed case. Pls.' Opp'n Br. 19. That case seeks damages relating to genetically modified seed. American Seed Co. v. Monsanto Co., C.A. No. 05-535-SLR, 2006 WL 3276831, at \*1-5 (D. Del. Nov. 13, 2006).3

Plaintiffs' argument that the forum clause applies only to claims that are connected in any way to the Agreement and the use of seed misreads the contract. See Pls.' Opp'n Br. 10. Plaintiffs' premise is that the Agreement defines "Monsanto technologies" as "seed," and thus when the forum clause refers to use of the seed "or Monsanto technologies," it really covers only use of seed. In fact, the Agreement indicates that the word "seed" will refer to "seeds containing Monsanto technologies." Under no plausible manipulation of English can it be argued that the Agreement equates "Monsanto technologies," genetic traits, with the seeds in which they are contained. Indeed, if the word "seed" were interchangeable in the Agreement with "Monsanto technologies," many sections would be nonsensical. The phrase "seed containing Monsanto technologies" would translate to "seed containing seed." The reference in the forum clause to the "use of seed or Monsanto technologies," would translate to the "use of seed or seed." That Plaintiffs resort to such a strained interpretation of clear contractual language signals the weakness of their argument.

Plaintiffs cannot dispute that the language of the forum selection clause here is mandatory, and unlike the permissive clause this Court found did not require transfer of American Seed. See Def.'s Mem. Ex. G, American Seed Co. v. Monsanto Co., C.A. No. 05-535-SLR, Order (D. Del. Dec. 5, 2005); Def.'s Mem. Ex. B (designating St. Louis as "the sole and exclusive" jurisdiction and stating that "Any lawsuit must be filed in St. Louis, Mo.").

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Plaintiffs also argue that their claims "extend beyond" the Technology Agreement and therefore fall outside the Agreement's scope. Pls.' Opp'n Br. 13-14. To begin with, the Third Circuit, in Coastal Steel, did not hold that a forum selection clause could only cover claims dependent on the contract in which it appeared. Rather, the Court held that this connection was required by the forum clause there, which said that, "These conditions," that is, the ones in the contract, "shall be determined by the English Courts of Law." Coastal Steel, 709 F.2d at 193. By contrast, the forum clause here applies to "all claims and disputes arising out of or connected in any way with this Agreement and the use of the seed or the Monsanto technologies . . . ." Def.'s Mem. Ex. B (emphasis added).

The other cases cited by Plaintiffs are facially inapplicable here. See Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 293 (3d Cir. 1994) (agreement with forum clause had been rescinded, and operative agreement did not have one); Jayson Co. v. Vertical Mkt. Software & Vertical Software Servs., No. 05-3883, 2006 U.S. Dist. LEXIS 30638, at \*17 (D. N.J. May 18, 2006) (parties entered multiple contracts, and dispute did not arise from the contract containing the forum clause); Smith v. Lucent Techs., Inc., No. 02-0481, 2004 U.S. Dist. LEXIS 4074, at \*39, \*50 (E.D. La. Mar. 15, 2004) (recognizing that dispute need not arise from contract at issue, but finding that all misrepresentations alleged related to purchase agreement, not finance agreement with forum clause).4

Plaintiffs' remaining cases do not reflect the approach of the Third Circuit in favor of enforcing forum agreements, and are inapposite for other reasons as well. Farmland followed the policy then applicable in Missouri disfavoring forum clauses, and dealt with fraud relating to the formulation of a fiduciary contract. Farmland Indus., Inc. v. Frazier-Parrot Commodities, Inc., 806 F.2d 848, 851 (8th Cir. 1986) (when a "contract Footnote continued on next page

As a matter of law, policy and logic, there is no reason parties to a contract should be barred from agreeing on a forum for "any disputes," as opposed to only those disputes dependent on the contract in which the clause appears. Indeed, to hold otherwise would allow plaintiffs to evade contractual obligations by artful pleading. Coastal Steel, 709 F.2d at 203. ("If forum selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading."). In any event, as noted, all the Plaintiffs' claims funnel through the Technology Agreement. For example, Plaintiffs attack conduct by Monsanto purportedly designed to achieve a monopoly in genetically modified seeds. Pullen Compl. ¶ 58-76; Wade Compl. ¶ 60-78. But the alleged impact of that conduct in this case was to enable Monsanto to impose restrictions on growers through the Technology Agreement. But-for the alleged restrictions in that Agreement, they say, Plaintiffs could have avoided overcharges on Roundup herbicide.

Finally, Plaintiffs seek to evade the forum clause by pointing out that two of the Mississippi plaintiffs grow cotton - along with soybeans and corn - and that the forum selection clause contains an exception for cotton claims. Therefore, Plaintiffs reason, no claims advanced by any of the Plaintiffs could be subject to the forum clause. Plaintiffs are wrong.

Footnote continued from previous page

<sup>[</sup>is] tainted by fraud, the person defrauded cannot be held to the contractual forum selection clause"); see also Armco Inc. v. North Atlantic Ins. Co., 68 F. Supp. 2d 330, 339 (S.D.N.Y. 1999) ("This cause of action does not arise out of the Sales Contract itself, but rather out of the ... negotiation of the contract."). Moreover, the court in Farmland found the alleged scheme outside the scope of the forum clause principally because it involved parties not signatories to the agreement containing the forum clause. Farmland, 806 F.2d at 852; see also Armco, 68 F. Supp. 2d at 338-39 (noting that dispute involved individuals not signatories to agreement containing forum clause). Here, Plaintiffs all entered the subject contracts, and they do not allege fraud in the inducement.

None of the Plaintiffs grow only cotton, and two of the four Plaintiffs - including the only Plaintiff in Pullen Seeds - do not claim to grow cotton at all. The cotton exception is irrelevant to the two Plaintiffs who do not grow that crop. As for the other two, the forum clause excepts cotton claims because they may be subject to arbitration. Plaintiffs who grow soybean and corn cannot defeat a valid forum selection clause by adding other claims that may be subject to an exception – in particular, claims that may not proceed in court at all.5

Beyond that, courts repeatedly have enforced forum selection clauses, even against non-parties to the contract, where claims not subject to the clause are intertwined with claims that are. Steel Dynamics, Inc. v. Big River Zinc Corp., No. 1:06-CV-00110, 2006 WL 1660599, at \*8 (N.D. Ind. June 9, 2006) (despite the lack of a forum selection clause with respect to one contract, "the circumstances here warrant that the disputes arising under the two agreements be heard in the same forum, because the agreements are 'largely intertwined.'"); Photogen, Inc. v. Wolf, No. 00 C 5841, 2001 WL 477226, at \*2-4 (N.D. III. May 7, 2001) (disputes arising from employment agreement and confidential disclosure agreement, which were silent as to forum selection, had to be heard in the forum the parties selected in a research agreement, because "the claims are largely intertwined."); see also McNair v. Monsanto Co., 279 F. Supp. 2d 1290, 1303 (M.D. Ga. 2003) (forum selection clause applied even to a non-party because it was "foreseeable" that claims of non party would relate to other claims subject to the clause). The argument for enforcing the clause is far stronger here, where all the Plaintiffs not only are parties to

See Palcko v. Airborne Express, Inc., 372 F.3d 588, 597-98 (3d Cir. 2004) (defendant that moved to dismiss on threshold forum issues did not waive right later to move to dismiss for failure to state a claim based on arbitration or other grounds not expressly waived under Fed. R. Civ. P. 12(h)(1)).

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the contract but assert claims as part of the same cause of actions that are subject to the forum selection clause.

The Technology Agreement is in plain English. "All claims" includes the ones Plaintiffs advance here. "Any lawsuit" includes these cases.

## PLAINTIFFS FAIL TO OVERCOME THE PRESUMPTION II. THAT THE FORUM CLAUSE IS VALID AND ENFORCEABLE

A party challenging a forum selection clause "has a particularly high burden." Fleming & Hall, Ltd. v. Cope, 30 F. Supp. 2d 459, 463 (D. Del. 1998). The Third Circuit has held that "a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement established (1) that it is the result of fraud or overreaching; (2) that enforcement would violate a strong public policy of the forum; or (3) that enforcement would in the particular circumstances of the case result in litigation so seriously inconvenient as to be unreasonable." E.g., Coastal Steel, 709 F.2d at 202. Plaintiffs do not carry this burden.

First, Plaintiffs do not allege that the Technology Agreement was the result of fraud or overreaching.

Second, Plaintiffs fail in their attempt to contrive some public policy argument based on a separate remedies provision in the Technology Agreement. In particular, Plaintiffs assert that the remedies provision of the Agreement would preclude them from recovering antitrust damages and is therefore unconscionable and against public policy. Contrary to Plaintiffs' straw man argument, the provision limiting damages by its terms relates to the "use or handling of seed" and does not apply to Plaintiffs' antitrust claims. Thus, the "unconscionable" outcome that Plaintiffs warn against is not called for by the

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It is black letter law that courts seek to avoid a reading of a contract that would render it illegal. Here, if this Court reads both the forum selection and the use/handling limitation of remedies as written, no public policy issue arises. But if this Court were to read the forum clause literally while inflating the plain language of the remedies clause, as Plaintiffs urge, a public policy issue might arise. As the Supreme Court stated in the Howard v. Illinois Cent. R.R. Co., 207 U.S. 463, 502 (1908), "To state the proposition is to refute it."

By its terms, the forum selection clause is broader than the remedies clause. The remedies clause is a standard contract provision that limits "any and all losses, injury or damages resulting from the use or handling of seed containing Monsanto technology." Def.'s Mem. Ex. B. Thus, while the forum clause applies to "all claims and disputes," the remedies clause only covers losses, injury or damages. While the forum clause encompasses such disputes if they are "connected in any way" with the Technology Agreement and "use of Monsanto technologies," the remedies clause requires a causal link with the "use or handling of seed" containing Monsanto technologies. While the forum clause extends to "any lawsuit," the remedies clause provides a list, not exclusive but illustrative, of the types of claims it covers, "claims based in contract, negligence, product liability, strict liability, tort otherwise." Plaintiffs thus ignore the plain language of both provisions. It simply does not follow that if the forum clause applies in antitrust cases, the remedies clause, specifically limited to losses resulting from the use or handling of seeds, must apply as well. Indeed, Monsanto has successfully enforced the

forum clause in antitrust litigation, but has not argued, and does not argue here, that the remedies clause limits antitrust damages. See Blades v. Monsanto, No. 00-CV-4034-DRH, 2001 WL 775980 (S.D. III. Jan. 3, 2001); Massey v. Monsanto Co., No. 299CV218-P-B, 2000 WL 1146705 (N.D. Miss. June 13, 2000).

Third, Plaintiffs have not met their burden of showing that enforcement of the forum selection clause would "result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." *E.g.*, *Coastal Steel*, 709 F.2d at 202. Indeed, Plaintiffs do not even attempt to meet this standard. Instead, they allege that litigation in this Court would be more convenient and further judicial economy because this Court heard the *American Seed* case. Even if these Iowa and Mississippi Plaintiffs had some connection with this District – which they do not – comparative convenience is not sufficient to override the parties' contract. *See id.*; *Hays and Company v. Merrill Lynch*, *Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1162 (3d Cir. 1989) ("concerns about delay and cost in the enforcement of a forum selection clause are not alone sufficient to overcome the policy favoring enforcement of such clauses.").

In any event, dismissing the cases and allowing Plaintiffs, should they choose, to refile them in St. Louis would not hinder judicial economy. The Eastern District of Missouri has substantial experience with the issues and technologies in this case. Aside from presiding over the 13 putative antitrust class actions upon which the present cases

Even assuming that the remedies clause applied to antitrust damages and were found unconscionable, that would not affect the enforceability of the forum clause. The Technology Agreement clearly states, "If any provision of this Agreement is determined to be void or unenforceable, the remaining provisions shall remain in full force and effect." Def.'s Mem. Ex. B. Indeed, in *Monsanto Co. v. McFarling*, the Court found a separate liquidated damages clause in the Technology Agreement unenforceable, 363 F.3d 1336 (Fed. Cir. 2004), after finding the forum selection clause enforceable. *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002).

were based (see chart attached to Monsanto's opening brief as Ex. A), the Eastern District of Missouri repeatedly has considered the Technology Agreement. In addition, that District recently was designated as the forum for multidistrict litigation on cases involving genetically modified rice. See In re LLRice 601 Contamination Litigation, Docket No. 1811 (J.P.M.L. Dec. 19, 2006), available at http://www.ipml.uscourts.gov/Pending MDLs/Miscellaneous/MDL-1811/MDL-1811-TransferOrder.pdf. Plainly, this Court has such experience and expertise as well. But the contracts here designate Missouri. Far from making the parties' choice of forum unreasonable, factors of convenience and judicial economy point toward Missouri.

# **CONCLUSION**

Plaintiffs agreed to bring suits like these in St. Louis. Those agreements are valid and enforceable. The Court should hold Plaintiffs to their contractual commitments and dismiss the Complaints.

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Dated: January 12, 2007 772322 / 30803

Respectfully submitted,

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POTTER ANDERSON & CORROON LLP

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# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

# CERTIFICATE OF SERVICE

I, David E. Moore, hereby certify that on January 12, 2007, the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading:

Jeffrey S. Goddess Rosenthal, Monhait & Goddess, P.A. 919 Market Street, Suite 1401 P.O. Box 1070 Wilmington, DE 19899

I hereby certify that on January 12, 2007, I have sent by Electronically Mailed the foregoing document to the following:

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# **Exhibit D**

# 2007 MONSANTO TECHNOLOGY/STEWARDSHIP AGREEMENT (Limited Use License)

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# GROWER INFORMATION (please print)

Please complete this section with your business information. To sign this Agreement you must be the operator/grower for all fields that will grow plants from Seed you obtain containing Monsanto Technologies (defined below). You represent that you have full authority to and do hereby bind to this Agreement yourself, all entitles for which you obtain Seed, all individuals and entitles fraviorally an ownership interest in any entities for which you obtain Seed, and that Monsanto Company has not barred any of those individuals or entities from obtaining this immed-use license. Your name must be filled in and must match the signature below. This Monsanto Technology/Selewardship Agreement becomes effective if and when Monsanton Issues the Growes a license number from Monsanto's home office in St. Louis, Missouri. Monsanto does not authorize seed desiers or seed retailers to issue a license of any kind for Monsanto Technologies.

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Grower's rights may not be treasformed to anyone else without the written consent of Monsanto, If Grower's rights are transferred with Monsanto's consent or by operation of law, this Agreement is binding on the person or entity receiving the transferred rights. If any provision of this Agreement is determined to be void or unmolocceable, the remaining provisions shall remein in full force and effect.

Grower acknowledges that Growel' has reteined a copy of Manashto's Technology Use Guide (TUG), To obtain additional copies of the TUG, contact Monaento at 4-600-768-6387 or go to www.Tamascusco.com. Quae effective, this agreement will remain to offer until either Grower or Monaento drasse to Estemanto the Agreement, Information regarding here and existing Manasanto Technologies, including any edificions or deletions to the U.S. paterns licensed under this agreement, and any new terms will be maded to you each year. Confiniting use of Monaento Technologies lefter recipit of any new terms constitutes Grower's agreement to be bound by the new terms. U any provision of this Agreement is determined to be void or trensforceable, the sensiting provisions shall contain the first open and the containing provisions and the first open and the containing provisions and the first open and the containing the provisions and the first open and the containing provisions and the first open and the containing provisions and the containing the provisions and the first open and the containing provisions and the containing the containi

# GROWER RECEIVES FROM MONSANTO COMPANY:

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  Monsanto Technologies are protected under U.S. patient law. Monsanto licenses the Grower under applicable patents owned or Eveneed by Monsanto, to use Monsanto Technologies subject to the conditions failed in the United States that has been purchased in most before the transfer Seed to anyone outside of the U.S.

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PLEASE MAIL THE STORED 2007 MONSANTO TECHNOLOGY/STEWARDSHIP AGREEMENT TO: Sorver Licensing, Monsento, 622 Emmson Road, Suide 150, St. Louis, MO 63142. This Monsento Technology/Stewardship Agreement becomes effective if and when Monsento License the Grawer a Cremse number from Monsento's home office in St. Louis, Missouri. Monsento license to sulfortae seed dealers or seed relaided to issue a Cremse of any kind for Monsento Technologies.

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  To read and follow the applicable sections of the TUG, which is incorporated lete and is a part of this Agreement, for specific requirements relating to the terms of this Agreement, and to abide by and be bound by the terms of the TUG as it may be amended from time to time.

  To acquire Seed contribing these Managanie Technologies only from a seed company with technology lices does not have a part of, associated with or collected with the Seed purchase price or that are involved dealer.

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  Upon written request, to ellow Monaganie to review the form Service Agency top reporting information on any lead lamned by Grower feduring Summary Accesse History Report, form 578 and corresponding pedat photographs, to allow Monaganies and copy any records and receipts that could be relevant to finance of this Agreement.

# GROWER UNDERSTANDS:

- GROWER UNDERSTANDS:

  Commodity Marketing: Grain/commodities harvested from Yieldoard Pius com. Yieldoard Pius with Roundup Ready Com 2, Yieldoard Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Good Roundup Ready Com 2, Yieldoard Com Buier With Roundup Ready Com 2, Yieldoard Com Buier With Roundup Ready Com 3, Yieldoard Com Buier With Roundup Ready Com 3, Yieldoard Com Buier With Roundup Ready Com 3, Yieldoard Com Buier Roundup Ready Com 3, Yieldoard Com Buier With Roundup Ready Com 3, Yieldoard Com Buier Roundup Ready Com 3, Yieldoard Com Buier Roundup Ready Com 3, Yieldoard Com Buier Roundup Ready Com 3, Yieldoard Roundu

## MONSANTO'S REAREDIES

MONSANTO'S REMEDIES:
If Grower breaches this Agreement, in addition to Monsanto's other mendies, Grower's limited use license will terminate immediately. Thereafter, Monsanto will not accept any application for a new Monsanto Technology/Stewardphip Agreement unlass Measured provides in wirting an authorization specifically carning Grower. Any such compared agreement that does not contain Monsanto's express authorization (whether a license number has been bessed or not is word. If Grower is found by any count to have instanted any term of this Agreement analys' to have infringed one or more of the U.S. patients forced below, Grower capter that among other things, Monsanto will be entitled to a premanent injuration employing Grower from making, using, selling, or offering for sale Seed. Additionally, Grower Joseps that any such initing of infringement by Grower is found and the selling of infringement of the U.S. patients found by any count to have inflinged one or more of the U.S. patients found the way of the selling of infringement damages to have breached this agreement, Grower wages to pay Monsanto and the Remand Monsanto Technology providency that attempted for an other expenses incurred in empricing rights under the contract including, but not limited to, expenses incurred in empricing rights under the contract including,

Grower accepts the Lerins of the Editoring Notice recurrement, limited warranty and disclamber of varranty and exclusive limited remedy by signing this agreement under opening a bag of Seed containing Montainto Technology. If Grover does not again to be bound by the conditions of purchase or use, Grower agrees to return the impresent bags to Science's seed dealer.

# NOTICE REQUIREMENTS

ASTICE REQUIREMENTS

As a condition precedent to Grower or any other person with an interest in Grower's crop asserting any claim, action, or dispute against Monazato and/or any seller of Seed containing Monazato Technologies regarding performance or an approximate of Messanto Technologies or the Seed in which it is considered, Grower must provide Monazato a switten, prompt, and timely notice (regarding performance or non-performance of the Monazato Technologies)

The notice will be timely only if it is delivered as days or less after the Grower first observes the issue(s) regarding performance or non-performance of the Monazato Technology and/or the Seed in which it is contained. The
notice shall include a statement setting forth the nature of the Chain, mans of the Monazato Technology, and Seed hybrid or vasiety.

# LIMITED WARRANTY AND DISCLAIMER OF WARRANTIES:

THE PROPERTY AND ASSESSMENT OF THE PROPERTY OF ECR PARTICIAAR PURPOSE

# GROWER'S EXCLUSIVE LIMITED REMEDY

GROWER SIGNATURE & DATE REQUIRED

THE EXCLUSIVE REMOTOR OF THE GROWER AND THE LIMIT OF THE LIMBUTY OF MONSANTO OR ANY SELER FOR ANY AND ALL LOSSES, WILKLY OR DAMAGES RESULTING FROM THE USE OR HANDLING OF SEED CONTINUING MONSANTO TECHNOLOGY (INCLUDING CLAIMS BASED IN CONTRACT, NEGLIGENCE, PRODUCT LIMBUTY, STRICT LIMBUTY, TORE OR OTHERWISE) SHALL BE THE PRICE PAID BY THE GROWER FOR THE QUANTITY OF THE SEED IN HIS EVENT SHALL MONSANTO OR ANY SELLER BE LIABLE FOR ANY INCIDENCAL, CONSEQUENTIAL, SPECIAL, OR PUBLISHED DAMAGES.

Thank you for choosing out advenced technologies, the look forward to working with you in the future. If you have any questions regarding the Monsanto Technologies or this license, please call the Monsanto Customer Relations Control at 1-800-ROUNDUR.

GOVERNING LAWS This Agreement and the parties' relationship shall be governed by the laws of the Stele of Missouri and the United States (without regard to the choice of law rules).

INDING ARBITATION FOR COUTON-RELATED CLAIMS MADE BY GROWER. Any claim or action made or asserted by a coltion Growst for any other person claiming an interest in the Grower's cotton crop) against Monacotto or any seller of cotton Seed containing Management Technology urining out of endfor in connection with this Agreement or the scale or performance of the cotton Seed containing Management Rehability of the provisions of the Fordard Authorization As you U.S.C. See a set as see, and administered under the Commercial Obspace Resolution Procedures actions that the conducted pursuant to this provisions of the Fordard Authorization As you U.S.C. See a set as see, and administered under the Commercial Obspace Resolution Procedures actions that the American Authorization Association (\*AAA\*). The term "seller" on used throughout this Agreement meets to all parties involved in the production, development, distribution, and/or sale of the Seed containing Management Checknologie in the event that a claim is not annuably resoluted which so down of Management's resolute of the Connects and the event that a claim is not annuably resoluted which so down the parties desire by migrating agreement. When a domain for a single and parties as the parties desire by migrating agreement. When a domain for a single transport of the containing and results are in addition, Grower and Management and proceedings and results are in the AAA fing feet, in addition, Grower and Management and proceedings and results are not remain conflicterial and an not to be disclosed without the written agreement of all have the power to apportion the utilizate increased of the arbitation or ward of the arbitation or ward of the arbitation or any other proceedings and results are to remain conflicterial and are not to be disclosed without the written agreement of all parties, except to the extent processing to effect and containing the processing and results are to remain conflicterial and are not to be disclosed without the written agreement of all parties

PORUM SELECTION FOR NON-COTTON-RELATED CLAIMS MADE BY GROWER AND ALL OTHER CLAIMS: THE PARTIES CONSENT TO THE SOILE AND EXCLUSIVE BURISDICTION AND VENUE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSORIU, FASTERN DIVISION, AND THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIU, FAIR LAWSART MUST BE FILED IN ST. LOUIS, MISSORIUM, FAIR LAWSART MUST BE FILED IN ST. LOUIS

THIS AGREEMENT CONTUNS A SIMBING ARBITRATION PROVISION FOR COTTON RELATED CLAIMS PURSUANT TO THE PROVISIONS OF THE FEDERAL ARBITRATION ACT, P U.S.C. 🐉 ET SEQ., WHICH MAY BE ENCORCED BY THE PARTIES.

Hamis	Date

2003 MONDANIO IECHNOLOGY/SIEI (Umited Use License)	VARDSHIP AGREEMENT							
FARM INFORMA	ION (please print)							
Please complete this section with your farm business information. The individuals and entitles bound by affiliated with, related to or having an ownership, in such farm business. Your name must be filled in and		ss listed below as well as all individuals or entitles						
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Area Code Business Phone Fas	\$660 \$10	<sub>य)</sub> डारायात्राया						
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Lic. #: 501697708 Batch #: 678	Date: 2423							
This Monascon Technology/Stewardship Agrestient is entered into between you (Grown) and Monaschip Compa	w (Sortanto) and consists of the terms on the same and	by the moure elds of this sum.						
This Monastria Technology/Stewardship Agreement grants you a limited license to use Roundup Ready® saybba Corn Borer with Reunalup Ready® com, Rasandop Ready® cotton, Bollyard® cotton, Bollyard® with Roundup Reunalup Ready® Canola (Monastro Technologies). This Agreement also contains your stewardship exponsibility of Contrains your stewardship exponsibility.	ns, YeldGard® Com Boser com and YieldGard® Com Room rady® cotton, BoseandWir cotton, BoseandWis with Rounds	voim tem", Roundup Resdy® com, YkidGard® ip Resdy® cotton, Roundup Ready® sugarbebts and						
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SIGNATURE) & DATE REQUIRED	PROVIDENS OF THE PEDERAL ANDIRATION ACT, 9 U.S.C. 1 E	it sect, which may be enforced by the parties.						
Hame down	-30-03							
The Agreement continues below and on the r	e everse side of this page.]							
YOU AGREE.  To changed grain pooduced to appropriate markets as necessary to purvent movement to markets when the grain has not yet received regulatory approval for import.  To implement an insect Resistance Averagement program as specified in the applicable Boligaid outloop and Yieldland own sections of the most resent Technologies solding (TUG) and to cooperate and comply with insect a first to supply any Seed containing Admission Technologies solding a Study commercial crop,  If not to supply any Seed containing potented Mondanto Technologies so may other person or entity for planting. Not to save any coop produced from this Seed to supply Seed produced from this Seed to supply seed produced from this Seed to supply Seed containing patented Mondanto Technologies Seed or for one preventing research, generation of harbicide seed for supply Seed produced from this Seed to supply Seed containing patented Mondanto Technologies Seed or for one preventing research, generation of harbicide selection and the supply Seed produced from this Seed to supply Seed produced from this Seed to supply Seed containing patented Mondanto Technologies Seed or for one preventing research, generation of harbicides selected as a selection of the supply Seed produced from this Seed to supply Seed produced from this seed to allow allowed the supply Seed produced from this seed to a supply Seed produced from this Seed to a supply Seed produced from this seed to a supply Seed produced from the Seed Seed Seed Seed Seed Seed Seed Se								
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AND CONDITIONS TON THE USE OF THOUSE TECHNOLOGIES.	A A Mande Boo	ord MONSANTO						
		MONSANTO COPY						

# YOU RECEIVE FROM MONSANTO COMPANY:

YOU RECEIVE FROM MONSANTO COMPANY.

A limited use ficense to purchase and plant seed containing Monsanto Technologies ("Seed") and apply Roundup agricultural herbicides and other authorized non-selective herbicides over the top of Roundup Ready crops (see: IUG find details; regarding authorized monselective herbicides over the top of Roundup Ready crops receives the right to use the Monsanto Technologies subject to the Conditions specified in this Agreement.

Enrollment in the value package relied Roundup Revards", designed to bring increased benefits to you.

A limited use license to prepare and apply on glyphosate relied Roundup Revards", designed to bring increased benefits to you.

A limited use license to prepare and apply on glyphosate herbicides tabeled for use on those crops with quizalolop, clethodim, selhoxydim, fluzzifop, and/or fenoxaprop to control volunteer Roundup Ready corn in Grower's crops for the 1003 growing season. However, neither Grower nor a third party may utilize any type of co-pack or prenix of glyphosate plus one or more of the above-identified active ingredients in the preparation of a tank mix.

YOU UNDERSTAND:

Channeling: Grain/commodities harvested from Roundup Ready com, VieldGard Com Borer with Roundup Ready com, Roundup Ready canola and Roundup Ready sugarbeets are approved for U.S. food and feed use, but not yet approved in certain export markets where approved is creat in to be received before the end of 2003. As a result, the Grower must direct those grain/commodities to the following approved market options; feeding on larm, use in domestic feed lots; elevators that agree to expect the grain, or other approved uses in domestic markets only. The American Seed Trade Association web site (www.amseed.org) includes a list of grain franket options; call seed to see the following paper of the seed within the United States where the products have been approved for use by all required governmental agencies.

Insect Resistance Management (RAD: When planning any YieldGard or Bollgard product, you must implement an IRM program including planting a non-Bi refuge according to the size and distance guidelines specified in the Bollgard cotton and YieldGard com sections of the most recent Monsanto TkG including any supplemental amendments. You may lose your limited use license to use these products if you fail to follow the IRM program required by this Agreement:

Internal control

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Grower's rights may not be imposed to anyone else without the written consent of Monsanto. If Grower's rights are transferred with Monsanto's consent or by operation of law, this Agreement is binding on the person or

entity receiving the transferred rights.

If Grover violates the terms of this Agreement, in addition to other remedies, Grover's rights pursuant to this Agreement will terminate immediately, and Grower and any entity owned or controlled by Grower forfeits any right to obtain an Agreement in the future and Grower's violation may result in infringement of one or more of the patents. Grower agrees to pay Monsanto and the locensed Monsanto Technology provider(s) their attorneys' fees and costs of enforcing this Agreement, if the Agreement is terminated, Grower will no longer have a right to purchase or use Seed containing Monsanto Technologies: Any obligations that arose before termination will continue in the event that Grower szeres, supplies, sells or acquires Seed (for painting in violation of this Agreement, Grower will be liable to Monsanto for patent infingement. In addition, Grower agrees that Monsanto not as a genalty that shall be equal to the gross revenue from such seed; grain, or files, poduced, from animage, use of Seed (calculated based upon the Chicaso Board of Trade price for the, applicable grain/comprodity as, of agreement and any land farmed by Grower initialing Forms 579 and corresponding senial photographs, Risk Management Agency claim documentation, and deakenterialer invoices for Grower's second and chemical transactions. Grower agrees to allow Monsanto to examine and copy any of Grower's seconds and measures that could be relevant to Grower's performance of this Agreement.

Grower acknowledges that grower has received a copy of Monsanto's TUS. To obtain additional copies of the Monsanto TUG, contact Worsanto at 1-800-768-6587. This Agreement will remain in effect until either you or Technologies after receipt of any new terms constitutes your agreement to be bound by the new terms. If any provision of this Agreement is determined to be vold or unanforceable, the remaining provisions shall remain in The state of the series of the

Grower accepts the learns of the following NOTICE REQUIREMENT, LIMITED WARRANTY AND EXCLUSIVE LIMITED REMEDY by signing this Agreement and/or opening a bag of seed containing Monsanto. Technology. If Grower does not agree to be bound by the conditions of purchase or use, Grower agrees to return the unopened bags to Grower's seed dealer.

NOTICE REQUIREMENTS

NOTICE REQUIREMENT:

As a condition precedent to Grover or any other person with an interest in Grover's crap asserting any dain, action, or dispute against Monsanto and/or any selter of Seed containing Monsanto Technologies retarding performance of non-performance of Monsanto Technologies of the Seed in Which it is contained, Grover mitst provide Monsanto a written, prompt, and timely notice fregarding performance or non-performance or non-performance of the Monsanto Technologies, and to the seed within sufficient time to allow an in-field inspection of the corps) about which any controversy, dains, action, or dispute is contained. The notice will be innerly only it it is contained in the seed within sufficient time to allow an in-field inspection of the corps) about which any controversy, dains, action, or dispute is contained. The notice shall induce a statement setting both the patture of the claim, many of the Monsanto Technology, and Seed hybrid or variety.

LIMITED WARRANTY AND DISCLAIMER OF WARRANTIES.

Monsority Warrants that the Monsorio Technologies decised beginner will perform as set fortis in the TUG when used in accordance with directions. This warranty applies only to Monsorio Technologies, contained in planting corth above. Monsorio Marsorio and seed companies decised by Monsorio in the seed company's authorized dealers of distributors. Except For the Express Warranties in the Tumbed Warranties of any kind, and disclaims at other Warranties of the Warranties in the Tumbed Warranties of Marsorio Corthagology. Monsorio Marsorio M EXCUSIVE LIMITED REMEDY

exclusive lamind, remply.

The exclusive remedy of the grower and the limit of the labbity of monsaito or any seller for any and all losses, invery or damages resulting from the use or handling of seed containing monsanto technology (including clams based in contract, negligence; product lability, strict lability, tort, or otherwise) shall be the price paid by the grower for the quantity of the seed involved or, at the election of monsanto or the seed seller; the replacement of the seed. In no event shall monsanto or any seller be liable for any incidental, consequental, special, or purifye damages.

Thank you for choosing our advanced technologies. We look forward to working with you in the future. If you have any questions regarding the Monsanto Technologies, please call the Monsanto Customer Relations Center

PLEASE MAIL THE SIGNED 2003 MONSANTO TECHNICLOGY AGREEMENT TO Grover Licensing, Monsanto, 622 Emerson Road, Suite 150, St. Louis, MO 63141

The ficensed U.S. patents include: for YieldGard® Com Beret com - \$.484,956; 5.352,605; 5.538,877; 5.538,880; 5.359,142; 5.322,938; 5.164,316; 5.195,525; 5.424,412) 5.880,275; 5.859,347; 5.858,742; 5.593,874; 5.424,200; YieldGard® Com Rootworm com - \$.10,7732; 6,174,724; 5.484,956; 5.352,605; 5.538,877; 5.538,880; 5.359,142; 5.322,938; 5,164,316; 5.195,525; 5.858,742; 3.015,747,744; 5.484,956; 5.352,605; 5.538,877; 5.538,880; 5.554,798; 5.993,874; 5.853,472; 5.858,742; 3.015,747,744; 5.484,956; 5.372,605; 5.538,877; 5.538,880; 5.554,798; 5.993,874; 5.853,472; 5.804,472; 5.677,705; 5.644,876; 5.777,884; 5.778,985; 3.014,033,578,190; 5.804,472; 5.677,705; 5.644,876; 5.778,985; 3.014,033,578,190; 5.804,472; 5.677,705; 5.644,876; 5.778,985; 3.014,033,578,190; 5.804,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.684,472; 5.677,054; 5.67

ALWAYS READ AND FOLLOW PESTICIDE LABEL DIRECTIONS. Rounday® egicultural herbicides will kill crops that do not contain the Rounday Ready® gene. Roundayo, Roundayo Ready®, Bollgard®, VieldGard®, and the Vine agricultural herbicides.

See Servicement, of Monsanto Technology LLC Roundayo Revisatis\* is a servicement, of Monsanto Technology LLC © 2001 Monsanto Company, Roundayo Revisatis applies only to Roundayo Revisatis\* is a servicement, of Monsanto Technology LLC © 2001 Monsanto Company, Roundayo Revisatis applies only to Roundayo Branded and other specified Monsanto Technology LLC © 2001 Monsanto Technology LLC ©

# 2004 MONSANTO TECHNOLOGY/STEWARDSHIP AGREEMENT

Participated Transformation of the Property of the Section Con-	GROWER INFORMAT	(Of) (piesse print)		2 100 3 PA - 4 Sec.	
Presse complete this section with your business information, To sign (desired below). You represent that you have full authority to and do gravers status shapessare on Dec. (2) Mr. (1) Art. (1) Als.	this Agreement you must be the operation hereby bend to this Agreement of entitle Solike tin Se R. St. etc.)	Form Business Hame	plants from Seed you ob our name must be filed is	lain containing Morsanto Techno rand must match the signature t	logias Selove
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# GROWER RECEIVES FROM MORSANTO COMPANY:

GROWER RECEIVES FROM MONSANTO COMPANY:

A limited use license to purchase and plant seed ontaining Monsanto Technologies ("Seed") and apply Roundup agricultural herbicides and other authorized non-selective herbicides over the top of Roundup Ready crops, bonsanto, natialn ownership of the Monsanto Technologies including the genes (for example, the Roundup Ready gene) and the gene technologies Grower receives the right to use the Monsanto Technologies subject to the conditions specified in this Agreement and separate use agreements, which are required for canba and alfalfa.

Monsanto Technologies simple the dinade U.S. patient kaw, Mansanto Retroes the Grower, under applicable patients owned or licensed by Monsanto, to use Monsanto Technologies subject to the conditions isted in this Agreement. This Rense does not authorize Grower to plant Seed in the United States that has been purchased in another country or plant Seed in another country that has been putchased in the United States. The Renalment in the value package called Roundup Renards", designed to bring increased bernefits to you.

A limited use license to prepare and apply on glyphosale/oberant solybern, cotton, or canola corpos for have others prepare and apply (or have others sequentially apply), Roundup agricultural herbicides or other glyphosale herbicides tabeled for use on those crops with quizatdop, and/or fenoxapion to commod volunteer Roundup Ready corp in Grower's crops for the 2004 growing season. However, neither Grower nor a third parry may utility any type of capack or premix of glyphosale plus one or more of the above-identified active ingredients in the preparation of a tank mix.

## GROWER UNDERSTANDS:

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\*\*Channeling: Gala/commodities havested from Roundup Ready com, YieldGard Corn Borer with Roundup Ready corn, Roundup Ready carols, YieldGard Roonworm corn, and Roundup Ready sugarbeets are approved for market options: feeding up farm, use in denestic feed lots, elevators that agree to accept the grain, or other approved uses in demestic markets only. The American Seed Hade Association web site (where approved includes a list of grain handlers' positions on accepting Roundup Ready corn. You must complete and send to Monsonto a Market Chokes\*\*\* form. For additional information on grain market options or to obtain additional forms.

includes a list or grain nancers' positions on accepting numeroup seasy core, too most complete and send to monstance a more concept.— Intin. cur additional monators of positions on accepting numeroup seasy core, to ocean additional forms, call recovered for use by all required governmental agencies.

Regulatory approvals: Monstanto Yechnologies may only be used within the United States where the products have been approved for use by all required governmental agencies.

Insert Resistance Management (RAM): When planting any VieldGard or Bollgard product, Grower must implement an IRM program including planting a non-8t reliable according to the size and distance guidelines specified in the Bollgard cotton and VieldGard core sections of the most recent Monstant Technology Use Guide including any supplemental amendments (collectively "TUG"). Grower may lose Grower's limited use license to use these products if grower fails to follow the IRM program required by this Agreement.

Pollen flow: Refer to the TUG for information on coop stewardship regarding the potential movement of pollen to neighboring crops.

## GENERAL TERMS:

octions. Journal Ground the transferred to anyone else without the written consent of Monsanto. If Grover's rights are transferred with Monsanto's consent or by operation of law, this Agreement is binding on the person or entity receiving the transferred rights. If any provision of this Agreement is determined to be void or unenforceable, the remaining provisions shall remain in full force and effect.

Grower acknowledges that Grower has received a copy of Monsanto's Technology Use Guide (IUG). To obtain additional copies of the Monsanto Technology Use Guide, contact Monsanto at 1-800-768-6387. This Agreement will remain in effect until either Grower or Monsanto choose to terminate the Agreement. Once you entrol, information regarding new and existing Monsanto Technologies and any new terms will be malfed to you each year, remaining sprovisions shall remain in full force and effect.

## MONSANTO'S REMEDIES:

MONGANTO'S REMEDIES.
If Grover violates the terms of this Agreement, in addition to other temedies, Grower's rights pursuant to this Agreement will terminate immediately, and Grower and any entity receiving Seed from Grower are precluded from obtaining an Agreement or otherwise aquising Seed of any brand in the future, and Grower's violation may result in infingement of one or motified the patents. Grower agrees to pay Monsanto and the itemsed Monsanto Technology providerigh their attempts fees and costs of enforcing this Agreement. If the Agreement is terminated. Grower will no longer have a right to purchase or use Seed containing frontsanto Technologies. Any obligations that the content of the Company of the Containing fronts and the itemsed Monsanto Technologies. Any obligation of this Agreement, Grower will be liable to Monsanto Technologies and the Containing fronts to the Containing Monsanto Technologies as just compensation and on at as a penalty, in the event that the Grower saves, supplies, setts or acquites Seed for planting in violation of this Agreement, Grower agrees that Monsanto Technologies and the Containing Monsanto Technologies and Monsanto Technologies the Containing Monsanto Technologies and Monsanto Technologies the Containing Monsanto Technologies and Monsanto Technologies the Containing Monsanto Technolog

Grower accepts the terms of the following NOTICE REQUIREMENT, LIMITED WARRANTY AND DISCLAIMER OF WARRANTY AND EXCLUSIVE LIMITED REMEDY by signing this Agreement and/or opening a bag of seed containing Monsanto Technology. If Grower does not agree to be bound by the conditions of purchase or use, Grower agrees to return the unopened bags to Grower's seed dealer.

## NOTICE REQUIREMENT

NOTICE REQUIREMENT:
As a condition precedent to Grower or any other person with an interest in Grower's crop assigning any claim, action, or dispute against Monsanto amilior any seller of Seed combining Monsanto Technologies regarding performance or non-performance of Nonsanto Technologies and to the seller of any Seed (regarding performance or non-performance of the Seed) within sofficient time to allow an in-field inspection of the trapic) about which any controversy, claim, action, or dispute is contained. The notice will be threely only if it is delivered to days or less after the Grower first observes the issue(s) regarding performance or non-performance of the Monsanto Technology, and Seed Inspection of the Monsanto Technology and/or the Seed in which it is contained. The notice shall include a statement setting forth the nature of the Monsanto Technology, and Seed hybrid or variety.

LIMITED WARRANTY AND DISCLAIMER OF WARRANTIES.

Morsanto warrants that the Morsanto Technologies Ilcensed hereunder will perform as set forth in the TUG when used in accordance with directions. This warranty applies only to Mansanto Technologies contained in planting contained as been purchased from Monsanto and companies ilcensed by Morsanto or the seed company's authorized dealers or distributors. EXCEPT FOR THE EXPRESS WARRANTIES IN THE LIMITED WARRANTY SET WEST AND THIRES BY PARTICULAR PURPOSE.

MEACHANTABILITY AND THIRESS FOR PARTICULAR PURPOSE.

GROWER'S EXCLUSIVE LIMITED REMEDY.
THE EXCLUSIVE REMEDY OF THE GROWER AND THE LIMIT OF THE LIABILITY OF MONSANTO OR ANY SELLER FOR ANY AND ALL LOSSES, INJURY OR DAMAGES RESULTING FROM THE USE OR HANDLING OF SEED CONTAINING
MONSANTO SECHNOLOGY (INCLUDING CLAMS BASED IN CONTRACT, NEGLIGENCE, PRODUCT LIABILITY, STRICT LIABILITY, TORT, OR DTHERWISE) SHALL BE THE PRICE PAID BY THE GROWER FOR THE QUANTITY OF THE SEED
INVOLVED OR, AT THE ELECTION OF MONSANTO OR THE SEED SELLER, THE REPLACEMENT OF THE SEED. IN NO EVENT SHALL MONSANTO OR ANY SELLER BE LIABLE FOR ANY INCIDENTIAL, CONSEQUENTIAL, OR

Thank you for choosing our advanced technologies. We look forward to working with you in the future, if you have any questions regarding the Mansanto Technologies or this Reense, please call the Monsanto Customer Religions Center at: 1-800-ROUNDUP.

PLEASE MAIL THE SIGNED 2004 MONSANTO TECHNOLOGY AGREEMENT TO: Grower Licensing, Monsanto, 622 Emerson Road, Suite 150, St. Louis, MO 63141. This Monsanto Technology Slewardship Agreement becomes effective if and when Monsanto Issues the Grower a license number in St. Louis, Missouri.

The Benned U.S. patents include: far Yielifoxid@ Com Botter om - 5,084,565; 5,382,605; 5,382,605; 5,382,807; 5,538,807; 5

ALWAYS READ AND FOLLOW PESTICIDE LABEL DIRECTIONS. Roundup® agricultural herbicides will kill crops that do not contain the Roundup Ready® gene. Roundup®, Roundup Ready®, Ballgard®, VieldGard®, and the Vine
agricultural herbicides.